No. 84048-2

SUPREME COURT
OF THE STATE OF WASHINGTON

MITCH DOWLER and IN CHA DOWLER, individually and as limited guardian ad litem for NAM SU CHONG, *et al.*,

Appellants,

vs.

CLOVER PARK SCHOOL DISTRICT, NO. 400,

Respondent.

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A. INTRODUCTION

This case involves allegations of physical, verbal, and psychological abuse and discrimination of developmentally disabled students by the staff at the Clover Park School District No. 400 ("District"). It does not involve any educational claims. If the torts alleged had occurred at work or in public, there is little question they would be actionable. Yet the District argues strenuously and fruitlessly that the plaintiffs ("Students") are required to exhaust their administrative remedies under the Individuals with Disabilities Education Act ("IDEA"). The response by the District rests on a foundation of sand. The Students have long since dismissed their educational claims, leaving only tort claims. There is no educational nexus in the Students' claims. Nevertheless, the District spends fifty pages trying to bind all of the Students' tort claims to the educational purpose of the IDEA, and to characterize all of the Students' claims of physical and mental abuse and discrimination as somehow educationally related. That attempt is a distraction from the very serious allegations the Students brought against the District.

The Students are not seeking to correct "deficiencies" in their education. Br. of Resp't at 2. Nor is the withdrawal of their educational claims a "tacit acknowledgement" that any such educational claims still

exist. *Id.* at 3. The Students have not waved a "magic wand" to make those claims "disappear." *Id.* The claims were properly dismissed and are no longer part of the case. The District must defend the case before it, not the case it wishes to defend.

Again and again, the District cites to depositions taken *long* before the trial court dismissed the Students' educational claims. Yet the District argues the Students must exhaust the administrative remedies for the very claims the court dismissed. In defending the indefensible, the District treats overt physical abuse, including sexual assault, as somehow arising out of the legitimate educational process.

The District's attempt to underplay the gravity of the Students' tort claims runs afoul of the standard of proof in a summary judgment action where all evidence must be viewed in a light most favorable to the Students. The District presents the facts with bland reassurances that the acts the Students complain of are merely routine educational practices or ordinary discipline. The Students' claims are emphatically not garden variety classroom procedures and classroom control (even accounting for requirements of the special-needs classroom). Despite the thick sugar coating the District offers, the facts must be construed the Students' favor.

Finally, contrary to the District's assertion, administrative exhaustion would be futile. That it would be futile is borne out by the

testimony of the director of special education at the Office of Superintendent of Public Instruction ("OSPI").

B. RESPONSE TO RESTATEMENT OF FACTS

The District has provided a brief Counterstatement of the Case, largely covering the procedural history of the case. Several elements of its Counterstatement should be noted. The District begins its recitation of the facts by detailing at length the educational claims in the May 7, 2007 complaint. Br. of Resp't at 4. The trial court, however, granted the Students' motion to dismiss all claims related to education pursuant to CR 41(a)(1)(B) on November 30, 2007. CP 1355-58. The educational claims cited by the District are no longer part of the case and irrelevant to the Students' present remaining tort claims.

The District describes Dr. Douglas Gill ("Dr. Gill") as "an employee" of OSPI. Br. of Resp't at 8. Dr. Gill is no mere employee, but the long-serving Director of Special Education of the OSPI. CP 2175.

Many of the District's factual assertions are contained in its analysis of the individual students' claims. The District cites extensively to depositions taken *long* before the Students' educational claims were dismissed. *See* Br. of Resp't at 26, 30, 32, 34, 35, 36, 38, 39, 41, 42, 43, 45, 46. Like the educational allegations mentioned above, the deposition testimony has no relevance, as the educational claims were dismissed.

Moreover, all of the Students either have already graduated, or are scheduled to graduate this spring. CP 501, 541, 639, 679, 703, 719, 735, 769-70, 3444, 3446, 3448, 3450, 3452, 3454, 3456, 3458, 3460.

The District's factual assertions regarding individual tort allegations will be further addressed below.

C. ARGUMENT

(1) Summary Judgment Is Appropriate Here

The District acknowledges that this Court reviews summary judgment *de novo*. Br. of Resp't at 9. But it does not seem to appreciate that this Court does not weigh the evidence. *See Fleming v. Smith*, 64 Wn.2d 181, 185, 390 P.2d 990 (1964). The facts and all reasonable inferences must be viewed in the light *most favorable to the nonmoving party*, namely the Students. *Hearst Commc'ns, Inc. v. Seattle Times Co.*, 154 Wn.2d 493, 501, 115 P.3d 262 (2005). The District does not restrict itself to this long-established standard, arguing instead that it is immaterial whether the Students' allegations are true, and that the facts as presented by the Students are "extremely unlikely" to be true. Br. of Resp't at 37. How the District characterizes the facts is irrelevant. It is how the Students present the facts, as the non-moving party on summary judgment, that is relevant.

(2) The IDEA Does Not Require the Students to Exhaust Administrative Remedies

The District labors to frame the Students' tort claims as educational, thus requiring them to exhaust their remedies under the IDEA. It engages in a lengthy explication of the IDEA, the Students' right to a free and appropriate public education ("FAPE"), and their individualized education programs ("IEP"). This emphasis on educational issues is a red herring, as the IDEA has no bearing on the Students' tort claims. The Students are alleging physical abuse, and discrimination under RCW 49.60, the Washington Law Against Discrimination ("WLAD"). They are not challenging matters relating to their education. Br. of Resp't at 11. Nor are they objecting to the adequacy of the education provided them, the construction of their IEP, or any other related matter. *Id.* The District proposes that an administrative law judge could order "a wide range of relief, including tutoring, reimbursement for private instruction, extended school year instruction, and extracurricular activities." *Id.* at 12. How those could be remedies for physical, mental, and sexual abuse and discrimination under WLAD, the District does not say.

The IDEA was enacted to address the special educational needs of disabled children. *Tunstall v. Bergeson*, 141 Wn.2d 201, 228, 5 P.3d 691

(2000), *cert. denied*, 532 U.S. 920 (2001). It is designed to address the strictly *educational* concerns of students with disabilities. *See* 20 U.S.C. § 1401(22) ("related services" available under the IDEA include "psychological services . . . social work services, counseling services . . . *as may be required to assist a child with a disability to benefit from special education*[.]") (emphasis added)). IDEA's purpose is to ensure that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs. *Tunstall,* 141 Wn.2d at 228. As the District acknowledges, the IDEA is designed to assure appropriate education for special education students, but *abuse and discrimination have no part in an appropriate education* as OSPI's Dr. Douglas Gill testified. CP 2176. The Students are not alleging that they were denied a FAPE or that the harm they suffered at the hands of the District impacted their education. Instead, they allege that they were verbally and physically assaulted, harassed, and discriminated against by the District. They suffered personal and dignitary torts that stand apart from the IDEA. Consequently, the Students need not exhaust administrative remedies under the IDEA.

The District cites numerous cases to support its argument that the IDEA requires the Students to exhaust administrative remedies. The cases

cited however, are uniformly distinguishable and do not in any way stand for the proposition that tort claims, independent of educational claims, may not be brought before exhausting the IDEA administrative process. They certainly do not equate a student's FAPE or IEP with abuse. As the court in *Hoeft v. Tucson Unified Sch. Dist.*, 967 F.2d 1298 (9th Cir. 1992) stated, the IDEA's exhaustion requirement allows for the full exploration of *technical educational issues*. *Id.* at 1303.[1] The exhaustion requirement does not apply to tort claims unconnected to those technical educational issues.

The District cites *Charlie F. v. Board of Educ. of Skokie Sch. Dist. No. 68,* 98 F.3d 989 (7th Cir. 1996) to bolster its argument that the IDEA requires exhaustion here. Br. of Resp't at 15-16. *Charlie F.* however, was a suit brought solely on educational grounds. There, the plaintiffs filed suit over "misconceived educational strategies." 98 F.3d at 991. The complaint dealt with acts that had both an educational source and an adverse educational consequence. *Id.* at 993. Abuse, either physical or mental, played no role in the case.

Likewise, *Robb v. Bethel Sch. Dist.*, 308 F.3d 1047 (9th Cir. 2002) dealt exclusively with educational claims. Br. of Resp't at 16. The

[1] In *Hoeft*, the plaintiffs alleged that the school district's policies concerning extended school year services operated to deny children with disabilities an appropriate, individually tailored education. 967 F.2d at 1299.

parents of the disabled student in *Robb* sued after their daughter's teachers began removing her from the classroom five times a week for extended peer-tutoring by junior high school and high school students without the supervision of a certified teacher. 308 F.3d at 1048. The *Robb* court held that administrative exhaustion was required, and that the school district would be able to provide developmental, corrective, and other supportive services required to assist a disabled child to benefit from special education. *Id.* at 1050. Those remedies would allow the child to "catch up with her peers academically." *Id.* The claim was consummately educational and involved no allegations of abuse or discrimination. The District summarizes the holding in *Robb* as one which allows a special education student to "obtain the benefits of a public education." Br. of Resp't at 18. The benefits of a public education do not include abuse and discrimination.

Kutasi v. Las Virgenes Unified Sch. Dist., 494 F.3d 1162, 1169 (9th Cir. 2007) also dealt solely with educational issues. The complaint in that case listed numerous allegations, including failing to properly investigate and remedy complaints of noncompliance filed with the United States Department of Education, Office for Civil Rights; interfering with custodial rights; refusing to allow the student to attend a particular school; refusing reimbursement for the student's therapy; deliberately setting an

IEP on the student's birthday; and failing to provide the parents periodic reports of the student's progress while other parents received such reports. *Id.* at 1164-65. The contrast between those purely educational claims and the claims of physical abuse in present case could not be more stark.

Other cases cited by the District contain nothing remotely like the Students' tort claims, and are entirely distinguishable.[2] A brief review of the cases illustrates how thoroughly they are tied to strictly educational issues.

Payne v. Peninsula Sch. Dist., 598 F.3d 1123 (9th Cir. 2010), br. of resp't at 19, was a split decision that concerned the use of a time-out in a "safe room" as a tool for managing a special education student's behavioral issues. 598 F.3d at 1125. Critically, the use of the safe room was incorporated into the child's IEP. *Id.* The parents' suit concerned the long-term consequences of the time-out procedure. *Id.*[3]

The dispute in *Diaz-Fonseca v. Puerto Rico,* 451 F.3d 13 (1st Cir. 2006), br. of resp't at 19, was over whether a school district was required provide a disabled child swimming classes as a form of adaptive physical

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[2] This applies equally to the ALJ cases the District attempts to distinguish on pages 24 and 25 of its brief, *B.D. & D.D., Parents of C.D. v. Puyallup Sch. Dist.*, OAH Special Education Cause No. 2008-SE-0081, and *D.V. v. Bethel Sch. Dist.*, OAH Special Education Cause No. 2008-SE-0086.

[3] In his dissent, Judge Noonan, viewing the factor in the light most favorable to the plaintiffs, said that lacking an autistic child in a dark closet served no legitimate educational purpose. *Id.* at 1128-29.

education under her IEP. 451 F.3d at 19. The case was purely about an the child's education under the IDEA and involved no allegations of abuse.

Cudjoe v. Independent Sch. Dist. No. 12, 297 F.3d 1058 (10th Cir. 2002), br. of resp't at 19, involved a dispute between a home bound student suffering from the Epstein-Barr virus and the school district over which teacher would provide the child's educational services. 297 F.3d at 1061-62.

In *M.T.V. v. DeKalb County School Dist.*, 446 F.3d 1153 (11th Cir. 2006), br. of resp't at 19, a disabled child's parents alleged, inter alia, that the school district did not allow them to attend IEP meetings before or during school, forcing them to find child care; limited the time allotted for IEP meetings, requiring them to attend multiple meetings and miss work each time; the school district brought school administrators and lawyers into IEP meetings who would harass and scream at them; and the school district disallowed the child's former school occupational therapist from continuing to work with him because she advocated for him at an IEP meeting. 496 F.3d at 1155.[4]

[4] The parents also alleged that the district placed the child in a storage closet for occupational therapy, but the court did not address that allegation in its opinion, focusing instead on the parents' contention that the district retaliated against them for "advocat[ing] for their son's legal rights to receive an appropriate education and be free from discrimination based solely upon his disabilities." 446 F.3d at 1155, 1158.

In *Polera v. Board of Educ. of Newburgh Enlarged City Sch. Dist.*, 288 F.3d 478 (2nd Cir. 2002), br. of resp't at 19-20, a blind student alleged that the school district failed to provide her with study materials, compensation for tutoring, and recognition of academic achievements. 288 F.3d at 480.

The same focus on educational claims is found in the state court cases the District cites. In *Shields v. Helena Sch. Dist. No. 1,* 943 P.2d 999 (Mont. 1997), br. of resp't at 20, a disabled child's parents alleged the district failed to properly identify, evaluate, and classify the student as disabled, thereby denying him his right to an appropriate education. 943 P.2d at 141. They also alleged discrimination when the child was prevented from accompanying his classmates on a ski trip. *Id.*

A purely educational issue was also at the heart of *Koopman v. Fremont County Sch. Dist. No. 1,* 911 P.2d 1049 (Wyo. 1996), br. of resp't at 20, where a special education student sued when he was not allowed to participate in a Naval Junior Reserve Officer Training Corps program field trip. 911 P.2d at 1051.

The District argues that exhaustion is required when claims of abuse and discrimination affect a student's FAPE. Br. of Resp't at 21. Once again, the case the District cites, *M.L. v. Federal Way Sch. Dist.,* 394 F.3d 634 (9th Cir. 2005), deals with a thoroughly educational assertion,

namely that the district's failure to include a regular education teacher on the team that prepared the students IEP rendered the IEP invalid under 20 U.S.C. § 1414(d)(1)(B)(ii). 394 F.3d at 636.

Hayes v. Unified Sch. Dist. No. 377, 877 F.2d 809 (10th Cir. 1989), br. of resp't at 20, was not brought under the IDEA but under the Education of the Handicapped Act ("EHA").[5] 877 F.2d at 810. Like *Payne, supra,* the case involved the use of a "time-out" room. *Id.* at 811. The time-out room was located in an annex of the classroom so that supervision over the student could be maintained while the student remained in the room and continued to work on classroom material. *Id.* at 813. The court held that the school's use of the time-out room was clearly related to providing an appropriate public education for the plaintiffs. *Id.* at 813. The temporary removal in *Hayes* is entirely distinguishable from the abuses alleged in the present case.[6]

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[5] The EHA is the predecessor statute to the IDEA. *Weber v. Cranston Sch. Comm.*, 212 F.3d 41, 50 (1st Cir. 2000).

[6] *Waterman v. Marquette-Alger Intermediate Sch. Dist.*, 739 F. Supp. 361 (W.D. Mich. 1990), br. of resp't at 20, was also brought under the EHA. *Id.* at 364. *Waterman* is an outlier among the District's cases in that it actually involved allegations of excessive discipline. *Id.* at 363. Citing *Hayes,* the court held that complaints about classroom discipline of special education students, even allegedly excessive disciplinary acts and practices, are cognizable under the EHA. *Id.* at 365. To the extent *Waterman* supports the District's contention that the Students must exhaust their administrative remedies, it must be recognized that this is the sole case it cites (and an EHA case at that) involving allegations of excessive discipline. The *Waterman* court conflated what it termed "disturbing allegations" of excessive and abusive discipline ranging from bodily humiliation and the withholding of food and medicine to repeated physical assault, with the educational functions controlled by the EHA. *Id.* at 363, 365. That the *Waterman*

In sum, the federal and state cases cited by the District clearly pertain to educational matters to which IDEA attaches. They do not address the physical and psychological abuse of disabled students or outright discrimination pleaded by the Students in this case.

After citing so many cases involving purely educational matters, the District gives short shrift (Br. of Resp't at 20-21) to the three principal cases that most resemble the case here: *Witte v. Clark County Sch. Dist.*, 197 F.3d 1271 (9th Cir. 1999), *Blanchard v. Morton Sch. Dist.*, 420 F.3d 918 (9th Cir. 2005), and *Meers v. Medley*, 168 S.W.3d 406 (Ky. App. 2004).

The District dispatches *Witte* and *Blanchard* by pointing out that the educational issues in both cases had been resolved. What the District does not acknowledge is that *the educational issues in the present case have also been resolved* – they were voluntarily dismissed with prejudice. CP 1358. The District did not appeal that dismissal.[7] Where a plaintiff voluntarily dismisses certain claims, this Court has limited its analysis to the remaining claims. *Simonetta v. Viad Corp.*, 165 Wn.2d 341, 346-47

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court chose to view physical assault as having a nexus with education is no reason for this Court to do so. That *Waterman* stands so anomalously alone among the District's case citations is indicative that it's rigid interpretation of the exhaustion requirement is in the minority.

[7] The effect of a voluntary dismissal of a complaint is to render the proceedings a nullity and leave the parties as if the action had never been brought. *Wachovia SBA Lending v. Kraft*, 138 Wn. App. 854, 861, 158 P.3d 1271 (2007), *aff'd*, 165 Wn.2d 481, 200 P.3d 683 (2009).

n.2, 197 P.3d 127 (2008). The Students dismissed all of their educationally-related claims *years* before the trial court ruled on the District's third and final summary judgment motion. CP 1358. Additionally, the Students have either graduated, or will have graduated in June, 2010 and would thus have no educational claims to bring.

Witte, Blanchard, and *Meers* control here. In *Blanchard,* the Ninth Circuit decided that exhaustion was not required where the plaintiff's injuries could not be remedied through the educational remedies available under the IDEA. 420 F.3d at 921-22. In reaching that result, the Ninth Circuit determined that emotional distress damages were non-educational and outside the ambit of the IDEA. Where money damages for retrospective and non-educational injuries are not available under the IDEA, administrative exhaustion is not required. *Id.* at 922.

In *Witte,* the Ninth Circuit observed that the IDEA was not well-suited to adequately addressing past physical injuries; instead, an award of monetary damages was appropriate. 197 F.3d at 1276. Where the student was not seeking relief that was also available under the IDEA, he was not required to exhaust administrative remedies before filing suit. *Id.* at 1275.

The *Blanchard* and *Witte* courts' conclusion that exhaustion is not required where the plaintiff's injuries cannot be remedied through the

educational remedies available under the IDEA is fundamental to the present case.

The District does not discuss *Meers* at all. The Students have alleged nearly identical claims as those in *Meers*, where two severely disabled students alleged their teacher physically and mentally abused them, and sought relief under 42 U.S.C. § 1983 and tort law. *Meers*, 168 S.W.3d at 408. They did not bring any claims under the IDEA. *Id.* There, as here, the central question was whether the students were required to exhaust administrative remedies under the IDEA. The Kentucky court held that allegations relating to physical assault or abuse are deemed outside the scope of the IDEA and are not subject to the exhaustion of administrative remedies requirement. *Id.*

The Students' claims are not subject to the IDEA's exhaustion mandate.

(3) The Students' Allegations Are of Serious Mental and Physical Abuse, and Discrimination

This case involves allegations of physical, verbal, and psychological abuse, and discrimination. It has nothing to do with alleged deficiencies in the Students' educations because the harm the Students have suffered constitutes a tort rather than a violation of their educational entitlement under the IDEA. Unauthorized acts of abuse and

discrimination are not components of a free and appropriate public education; thus, those acts do not fall within the purview of the IDEA and administrative exhaustion is not required. CP 2176-77, 2851-55. Abuse and discrimination are not education.

As noted *supra*, the facts of this case and all reasonable inferences must be viewed in the light most favorable to the Students. Nevertheless, despite the fact that the Students' educational claims were dismissed, the District attempts to reframe the facts as pertaining to the Students' education. The District presents the Students' allegations as the result of mere routine educational practices or ordinary discipline. In doing so, it cites *repeatedly* to depositions taken long before the educational claims were dismissed.

The Students have provided abundant testimony regarding abuse and discrimination. *See* CP 1098-1157. Given that the facts must be construed in the Students' favor, the acts complained of cannot be discounted as mere educational discipline. Extreme or inappropriate discipline, including corporal punishment, can become abuse that is outside the realm of education. *See* RCW 9A.16.100 (throwing, kicking, cutting, or striking a child, or doing any other act to a child that causes bodily harm greater than transient pain or minor temporary marks, is presumed unreasonable).

Several examples suffice to illustrate the nature of the Students' allegations. A teacher was physically and verbally abusive to the students on a daily basis. CP 317-20. The students were pushed, shoved, grabbed, and snatched at every single day, all day long. "It was a vicious cycle, every single day, all day long. Some kid was getting it." CP 318, 788-89. On several occasions a teacher pushed children so hard their bodies buckled from the force. CP 317, 322, 1027. A paraeducator and a mother both witnessed another paraeducator shove a student into a locker. CP 318, 790. Another paraeducator slammed the lid of a washing machine down on a student's hand and called him a "little motherfucker." CP 786. On one occasion another teacher threw a child onto the classroom couch and acted as if he was going to hit the child. CP 325, 785. On another occasion, a paraeducator pulled a plastic shopping bag over a student's head. CP 326. One child was forced to eat food he was not allowed to eat because of his physical ailments on a daily basis. CP 321. This type of conduct was actionable in *Witte*, 197 F.3d at 1273. Another child was often made to stand in a corner with his back to the class for as long as two hours at a time. CP 319. The staff called the students derogatory names, including "little devil," "faker," "little nasty ass," "motherfucker," and "faggot." CP 318, 322, 324, 335. The situation became so grave that

one of the paraeducators filed a police report. CP 1005-1110, 1027-28, 1032-35.

The District waves all this aside, insisting that the claims are all educationally related. It describes a student as being "guided" and requiring "some assistance to move him forward." Br. of Resp't at 28. Yet it was that same student who was thrown into a locker. CP 317, 790, 1007-08. The District admits that "grabbing a student's face might appear to be abuse." Br. of Resp't at 29. It then argues that excessive use of force, name-calling and discrimination could be addressed by a student's IEP. *Id.* at 30.

The District magnanimously acknowledges that sexual assault "standing by itself and with no nexus to IDEA," would not require exhaustion. *Id.* at 31. It then insists that concerns about sexual assault should have been raised "in a timely fashion" so that the student could receive "an appropriate education at the earliest time possible." *Id.* at 32, 35-36. The District provides no explanation for its insulting and absurd assertion that sexual abuse might have some tenuous "nexus" to education.

The District states "staff members may have to occasionally push or pull" another student. *Id.* at 33. It makes the sweeping and entirely unsupported assertion that "'unexplained injuries' do not create a basis for a tort claim against the district." *Id.* at 34. It dusts off the classic defense

of bullies everywhere by blaming another student's verbal, physical, and mental abuse on his disability which "made him more likely to provoke confrontations . . . ." *Id.* at 37.

Most egregious is the District's response to allegations that another student had been regularly pushed into lockers and constantly kicked by the staff. *Id.* at 37. "Even if these allegations are true, which is extremely unlikely, an ALJ could order counseling and other services to remedy negative effects." *Id.* As already noted, in a summary judgment action all evidence is viewed in a light most favorable to the non-moving party. There is no legal standard in summary judgment by which the court determines whether the facts asserted by the nonmoving party are "extremely unlikely" to be true. But more galling than the District's disregard of the summary judgment standard, is its astonishing assertion that counseling is the proper remedy for the "negative effects" of teachers constantly kicking and pushing their students. Under the District's anodyne interpretation of the law, it would be immune to *any* claims, apparently even rape and battery, as long as it can link the claims, however tenuously, to an educational purpose.

(4) Administrative Exhaustion Would Be Futile

The IDEA's exhaustion requirement is not unyielding. *See Hoeft*, 967 F.2d at 1303. The IDEA limits the exhaustion requirement to cases

where the plaintiff "seek[s] relief that is also available" under the IDEA. 20 U.S.C. § 1415(l). If the plaintiff seeks a remedy for an injury that could not be redressed by the IDEA's administrative procedures, the claim falls outside § 1415(l)'s rubric and exhaustion is unnecessary. *See Robb*, 308 F.3d at 1050. Any attempt by the Students here to exhaust their administrative remedies would be futile. Under *Witte* and *Blanchard*, the IDEA's administrative remedies cannot compensate for injuries that are completely non-educational. *See Blanchard*, 420 F.3d at 921; *Witte*, 197 F.3d at 1275-76.

The District cites to two letters written by Dr. Gill, Director of Special Education for the OSPI, in an attempt to refute the Students' assertion that the OSPI does not have jurisdiction over their abuse and discrimination claims. Br. of Resp't at 48; CP 1940, 1959. The District entirely ignores Dr. Gill's deposition testimony taken a month after the second letter. CP 2154. Dr. Gill, who had at that time been Director of Special Education for seventeen years, explicitly stated that the OSPI had no authority or jurisdiction to handle common law claims of assault, battery, or abuse, or over discrimination claims brought under WLAD. CP 2176. He further stated that the OSPI had no authority or jurisdiction to award monetary damages for physical or verbal abuse. *Id.* According to Dr. Gill, the OSPI could not provide any remedy for the Students'

allegations under the IDEA. CP 2176-77, 2854. Indeed, Dr. Gill stated that some of the accusations of abuse warranted notifying the police. CP 2053, 2063, 2164, 2166. Remedies under the IDEA do not cover claims for damages related to the common law, discrimination law, or support recovery of monetary civil damages when those claims are not related to educational matters.[8] CP 2851. If a parent is seeking only monetary civil damages for common law claims or statutory discrimination claims, the parents may elect to go directly to court. CP 2853. Dr. Gill's testimony makes clear that a remand to the OSPI to hear the Students' abuse and discrimination claims would be futile given the OSPI's interpretation of its own jurisdiction. As OSPI's chief official on the implementation of IDEA remedies, his view must carry great weight. Given Dr. Gill's testimony as Director of Special Education for the OSPI, the Students had no recourse but to seek judicial relief.

(5) The WLAD Does Not Require Exhaustion

The District argues that the Students have "challenged the special education programs and services" provided them, and are thus required to exhaust administrative remedies under state law. The Students are not making any educational claims, and the WLAD itself contains no

[8] In his declaration, Dr. Gill explicitly agreed with the reasoning of the ALJ in *B.D. & D.D., Parents of C.D. v. Puyallup Sch. Dist.*, that there is *no* jurisdiction under the IDEA to hear any statutory or common law claims and that those claims *must* be brought before a court with jurisdiction. CP 2852.

exhaustion provision. *See Adler v. Fred Lind Manor,* 153 Wn.2d 331, 342-44, 103 P.3d 773 (2004). Consequently, the Students are not required to exhaust any remedies under State law.

Weber v. Cranston Sch. Comm., 212 F.3d 41 (1st Cir. 2000), cited by the District in its brief at 49, does not support the District's argument at all. Like the other cases the District has cited, *Weber* did not entail any allegations of abuse. Rather, a mother sued the school district for retaliation after she sought to interfere with her child's IEP. *Id.* at 45-47. The court held the mother's claim of retaliation was literally "related" to the identification, evaluation, or educational placement of the child, and to her efforts to gain a FRAP for him, requiring exhaustion under the IDEA. *Id.* at 51. The court noted that the issue might have been a close one, if the mother had presented any argument about exhaustion but that she had "completely failed" to do so. *Id.* at 51-52. The court stated that the regulations requiring due process hearings under the IDEA do not appear to read "related" broadly, but instead provide for due process hearings that directly challenge decisions about a child's educational situation. In the face of those provisions, it held, a hearing officer *might* refuse to consider a retaliation claim. *Id.* at 52. But given that the mother failed entirely to raise the issue of futility on appeal, the court held exhaustion was required. *Id.* at 53. *Weber* actually supports the Students' position.

(6) The Students Are Entitled to Their Fees at Trial and on Appeal

Pursuant to RAP 18.1 and RCW 49.60.030(2), the Students request award of attorney fees and costs both at trial and on appeal, as argued in their opening brief.

D. CONCLUSION

The abuse and discrimination the Students suffered at the hands of the District served no legitimate educational purpose. The mere fact that the physical and dignitary torts occurred on school grounds does not bring the Students' claims within the scope of the IDEA or require them to exhaust administrative remedies before filing their lawsuit. The Students are not seeking relief available under the IDEA. Damages for past pain and suffering simply do not fit into the model of relief available under the IDEA and as such, requiring exhaustion with respect to such damages would be futile.

This Court should reverse and remand the case for trial on the Students' abuse and discrimination claims. Costs, including reasonable attorney fees, should be awarded to the Students.

DATED this 11th day of June, 2010.

Respectfully submitted,

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DECLARATION OF SERVICE

On this day said below, I deposited with the U.S. Postal Service and sent by email a true and accurate copy of: Reply Brief of Appellants in Supreme Court Cause No. 84048-2 to the following parties:

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I declare under penalty of perjury under the laws of the State of Washington and the United States that the foregoing is true and correct.

DATED: June 11, 2010, at Tukwila, Washington.

Christine Jones
Talmadge/Fitzpatrick

OFFICE RECEPTIONIST, CLERK

To: Christine Jones
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Attached for filing in case number 84048-2 is Reply Brief of Appellants Dowler.

Thank you, Christine.

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